No. 75-1804

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE DEFEIS and JAMES ANTONIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 530 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976. A petition for rehearing was denied on May 13, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal agents' mode of entry into an apartment violated 18 U.S.C. 3109, and whether, even if it did, suppression of the evidence seized therein was appropriate in light of the lawful presence of an undercover agent already in the apartment.

STATEMENT

Following a suppression hearing in the United States District Court for the Southern District of Florida, petitioners were tried by the court (upon the evidence and testimony adduced at the hearing) and were each convicted on two counts of possessing and distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner Antonio was sentenced to concurrent terms of six years' imprisonment on each count. Petitioner DeFeis has been released on bond and has not yet been sentenced. The court of appeals affirmed (Pet. App. A).

At approximately noon on July 23, 1974, Ronald Shulman, a government informant, and Mario Perez, an undercover agent for the Drug Enforcement Administration ("DEA"), entered petitioner Antonio's apartment with the latter's consent to negotiate the purchase of cocaine (Tr. 8-9, 184-185). Four other DEA officers were nearby. Two of them were monitoring a transmitting device being used by Shulman (Tr. 44-45, 64, 92).

Petitioner DeFeis arrived at the apartment at approximately 12:30 p.m. (Tr. 97). Antonio placed a quantity of cocaine on a table in the living room and assured Agent Perez of its high quality. Antonio also indicated that he had access to large quantities of cocaine and that future sales were possible (Tr. 184-186). Perez then told Shulman to go to his (Shulman's) car for the purchase money (Tr. 44, 188).

The order to Shulman to get the money was a signal to the agents that a drug transaction was occurring and that they should enter the apartment (Tr. 44). Once outside, Shulman met the agents and affirmed that the transaction was in progress (Tr. 44-45).

The testimony concerning the agents' entry into the apartment was conflicting. Three agents testified that

they approached the apartment door with Shulman, who knocked, that petitioner Antonio opened the door from within, and that the agents rushed through the open door with their guns drawn (Tr. 17-20, 28, 46, 66-67, 70, 77, 79-80, 101-103, 107-109).[1] Agent Williams, the first person to enter the apartment, said that it was necessary either to push or to pull the door somewhat, and that he assumed the door was bumped as the agents went by (Tr. 67, 79-80). As they entered the apartment, Williams announced their authority as federal agents and quickly placed the occupants—Antonio, DeFeis, and Perez—under arrest (Tr. 27, 50, 66, 149). Agent Perez continued his undercover role. His .45 caliber automatic was seized and he feigned a struggle with the agents (Tr. 33, 41, 72). Five ounces of cocaine and related narcotics paraphernalia were seized from the table in the living room, where the informant had said it would be (Tr. 29, 32, 47).

Petitioners, by agreement with the government, proferred testimony through their counsel. Antonio said that he was in the kitchen when the agents entered. Both denied hearing any knock and stated that the agents did not announce themselves until after they entered the apartment (Tr. 207-209).[2] A written statement by the informant, Shulman, to the effect that he had opened the door, was also introduced[3] (Tr. 163), as was a similar statement

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[1]One of the agents could not recall which way the door opened (Tr. 67). Two others stated their belief that the door opened inward and from the left side (Tr. 27, 103, 109), although it was later established that the door opened out and that the knob was on the right side (Tr. 199).

[2]Agent Perez testified that he heard a knock on the door and saw Antonio move in the direction of the door. He did not see who opened the door, however, since he was keeping watch on DeFeis (Tr. 146-149).

[3]Contrary to petitioners' contention that the government would stipulate only to one sentence of the statement (Pet. 10, 11), the government agreed "that if the informant were called to testify he would testify as to what is in that statement" (Tr. 159, 160).

made by Agent Sweat at a preliminary hearing shortly after petitioners were arrested (Tr. 20).[4]

ARGUMENT

Petitioners argue that the agents' entry into the apartment violated 18 U.S.C. 3109 and that the narcotics and other evidence seized in the apartment must therefore be suppressed. We submit, however, that the entry did not offend Section 3109 because no force of the sort condemned by that statute was used and because exigent circumstances were present in any event, and that Agent Perez's presence in the apartment and his constructive possession of the narcotics rendered the other agents' mode of entry, even if unlawful, irrelevant to the admissibility of the evidence.

1. Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Although the officers in this case were not acting pursuant to warrant, Section 3109 has been held to govern warrantless searches as well (*Miller* v. *United States*, 357 U.S. 301; *Sabbath* v. *United States*, 391 U.S. 585), and thus the statute applies here.

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[4]At the suppression hearing, Agent Sweat stated that he believed the door was opened by someone from within (Tr. 27). He was not, however, in the best position to observe, since three or four other agents preceded him into the apartment (Tr. 25). Agent Williams, who was standing immediately to the right of the door and was the first agent to enter the apartment, was certain that the informant did not open the door (Tr. 81-82).

While Section 3109 speaks of "breaking open" doors or windows, its implied prohibition has been construed to reach entries gained by use of force considerably less violent than that phrase connotes. Thus *Sabbath*, *supra*, held unlawful the unannounced opening of an unlocked door. Yet some minimal amount of force, in the sense of physical action by the officers to remove the barrier to entry must still be found to have been exerted before the statute's protection may be claimed. *United States* v. *Beale*, 445 F. 2d 977 (C.A. 5).

Almost all of the courts of appeals that have faced the issue have held that that minimal amount of force is lacking in cases where, as here, the officers enter through an open door. See, *e.g.*, *United States* v. *Morell*, 524 F. 2d 550, 556 (C.A. 2); *United States* v. *Lopez*, 475 F. 2d 537, 540-541 (C.A. 7); *United States* v. *Johns*, 466 F. 2d 1364 (C.A. 5); *United States* v. *Conti*, 361 F. 2d 153 (C.A. 2), vacated on other grounds, 390 U.S. 204; *United States* v. *Williams*, 351 F. 2d 475 (C.A. 6); *United States* v. *Hassell*, 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965.[5] The common rationale behind these decisions is that an entry through an open door is not the sort of violent or potentially dangerous act that the statute

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[5]The District of Columbia Circuit, alone among the federal courts, has held that officers must announce their authority and purpose before entering through an open door. *Hair* v. *United States*, 289 F. 2d 894. This case appears to be inconsistent with the language of Section 3109 and unsupported by the rationales for such a rule. See generally Note, *Announcement in Police Entries*, 80 Yale L. J. 139 (1970), and Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499 (1964). In any event, the present case presents an inappropriate vehicle for resolution of the long-standing conflict created by *Hair*, given the alternative bases for upholding the judgment below (see text, *infra*).

forbids. And it does not matter whether the door is completely or only partially open when the officers enter. See *Jones* v. *United States*, 336 A. 2d 535, 538 (D.C. Ct. App.), certiorari denied, 423 U.S. 997 (no announcement needed for officers to push open door partially opened by occupants); *United States* v. *Syler*, 430 F. 2d 68, 70 (C.A. 7) (same). Thus, even if, in passing through the already open door, the agents brushed against it or otherwise widened the space initially presented them, they did not use force to "break open" the door within the meaning of Section 3109, and accordingly the courts below were correct in ruling that the statute was not violated in this case.[6]

Moreover, this Court has acknowledged, in both *Miller* (357 U.S. at 309) and *Sabbath* (391 U.S. at 591), that there may be an "exigent circumstances" exception to the requirements of Section 3109. In this case the agents knew that a narcotics transaction was in progress at the time they entered the apartment and that an undercover agent was in the apartment with the suspects. Announcement of their identity and purpose might have jeopardized both the recovery of the evidence and the safety of the other agent. Even though the lower courts did not rely upon this rationale, the exigency of these circumstances provides another basis for upholding the decision below.

2. Even if the agents' mode of entry did violate Section 3109, admission of the evidence was nonetheless proper

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[6]The courts below do not appear to have resolved the controversy regarding whether petitioner Antonio or the informant Shulman opened the door. In either case the agents themselves did not. Even if it was Shulman rather than Antonio who opened the door, Section 3109 was not violated, given that Shulman had already been accepted into petitioners' midst and presumably need not have stood upon the formality of knocking and waiting for one of them to open the door before opening it himself.

in light of Agent Perez's lawful presence in the apartment at the time of the entry. Agent Perez's entry did not offend Section 3109, since "entries obtained by ruse * * * have been viewed as involving no 'breaking' " (*Sabbath*, *supra*, 391 U.S. at 590 n. 7). Unlike the informant in *Sabbath*, Perez was a full-time narcotics agent authorized to make arrests and seize evidence, and he was "under a duty to guard the contraband, which he did, and to take actual possession if necessary." *United States* v. *Glassel*, 488 F. 2d 143, 146 (C.A. 9), certiorari denied, 416 U.S. 941. The cocaine that petitioners placed on the living room table was in plain view (*Coolidge* v. *New Hampshire*, 403 U.S. 443), and Agent Perez may be said to have constructively possessed it at the time the other agents entered. In these circumstances the causal connection between seizure of the evidence and the other agents' entry, even if that entry was technically unlawful under Section 3109, was too attenuated to warrant suppression. *United States* v. *Glassel*, *supra*; see *United States* v. *Bradley*, 455 F. 2d 1181, 1186 (C.A. 1), affirmed on other grounds, 410 U.S. 605.[7]

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[7]*State* v. *Dugger*, 528 P. 2d 274 (Wash. App.), decided under a state "knock and announce" rule similar to Section 3109 and relied on by petitioners (Pet. 19-21), is to the contrary. That case is unpersuasive, however, and should carry little weight in the federal courts. The court there held that an undercover agent present at an unlawful dice game when other agents broke into the house should have "announced his identity and attempted to effect an arrest or seize evidence before his fellow officers entered" (*id.* at 277). Such a requirement would mean that undercover agents would have to reveal and discard their role whether or not its usefulness had come to an end, and that, in some cases, the agents would have to expose themselves to danger at the hands of the suspects without the aid of their fellow agents.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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